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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 390

INEZ M. JAMISON, WILLIAM N. DYKMAN, AND MARTIN E. GOETZINGER, EXECUTRIX AND EXECUTORS OF WILLIAM A. JAMISON, DECEASED, PETITIONERS,

vs.

VALENTIN ENCARNACION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1929

CERTIORARI GRANTED OCTOBER 21, 1929

(34,521)

(34,521)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 9, 1929

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1

COURT OF APPEALS

OF THE STATE OF NEW YORK.

VALENTIN ENCARNACION,
Plaintiff-Appellant,

against

2

WILLIAM A. JAMISON and CHRISTINA ARBUCKLE, doing business under the firm name and style of Arbuckle Brothers,

Defendants,

WILLIAM A. JAMISON,
Defendant-Respondent.

Statement Under the Rule.

3

The above entitled action was commenced by the service of the summons on defendant, William A. Jamison, on the 20th day of November, 1925.

The answer of the defendant was served on the 16th day of March, 1926.

The plaintiff's attorneys are Miele & Castellano, Francis A. Castellano, Jr., Esq., of counsel.

The defendant's attorney is James B. Henney, Charles G. Hill, Esq., of counsel.

This action was tried before Hon. Harry E. Lewis and a jury on the 9th day of March, 1928, and the jury rendered a verdict for plaintiff.

4 *Statement Under the Rule.*

Motion to set aside the verdict and for a new trial was denied.

The defendant's notice of appeal was filed the 30th day of March, 1928, and served the 31st day of March, 1928.

Upon appeal by the defendant to the Appellate Division, the judgment rendered upon said verdict was unanimously reversed upon the law and the facts, and the complaint dismissed.

Judgment of reversal and dismissing the complaint was entered in the office of the Clerk of
5 Kings County on July 16th, 1928.

Plaintiff's notice of appeal to the Court of Appeals was filed September 5th, 1928, in the office of the Clerk of the County of Kings, and was served on September 12th, 1928.

6

7

Notice of Appeal to Appellate Division.

SUPREME COURT,

KINGS COUNTY.

VALENTIN ENCARNACION,

Plaintiff,

against

WILLIAM A. JAMISON and CHRISTINA ARBUCKLE, doing business under the firm name and style of Arbuckle Brothers, 8

Defendants.

Sirs:

PLEASE TAKE NOTICE that the defendant, William A. Jamison, hereby appeals to the Appellate Division of the Supreme Court, in and for the Second Judicial Department, from the judgment entered herein in the office of the Clerk of the County of Kings, on the 15th day of March, 1928, in favor of the plaintiff and against the defendant, 9 William A. Jamison, in the sum of $2,638.05, and from each and every part of said judgment, both upon the law and the facts.

Dated, New York, March 29th, 1928.

Yours, &c.,

JAMES B. HENNEY,
Attorney for Defendant,
William A. Jamison,
100 William Street,
Borough of Manhattan,
City of New York.

10 *Summons.*

To:
MIELE & CASTELLANO, Esqs.,
Attorneys for Plaintiff,
299 Broadway,
Borough of Manhattan,
City of New York.

WILLIAM E. KELLY, Esq.,
Clerk, Supreme Court,
Kings County.

11

Summons.

SUPREME COURT,

KINGS COUNTY.

[SAME TITLE.]

To the above-named Defendants:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with
12 this summons, to serve a notice of appearance, on the plaintiff's attorneys within twenty days after the service of this summons exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated October 20th, 1925.

MIELE & CASTELLANO,
Attorneys for Plaintiff,
Office and Post Office Address,
299 Broadway,
Borough of Manhattan,
New York City.

13

Complaint.

SUPREME COURT,

KINGS COUNTY.

[SAME TITLE.]

Plaintiff, by Miele & Castellano, his attorneys, complaining of the defendants, says:

14

First: At all the times hereinafter mentioned, the above defendants were and they now are co-partners in business in the City of New York, under the firm name and style of Arbuckle Brothers.

Second: At all the times hereinafter mentioned, plaintiff was in the employ of defendants as a laborer or stevedore.

Third: On or about the 19th day of May, 1925, while plaintiff was at work as an employee for said defendants and engaged in their service on

15

a certain barge then lying in navigable water off the Jay Street Terminal, in the Borough of Brooklyn, where defendants have their place of business, without right or just cause the said defendants and their foreman or superintendent, who was delegated by defendant to give orders to plaintiff and his fellow-workers while working on said barge, committed a grievous assault and battery upon this plaintiff, by punching plaintiff about the head, face and body, knocking and throwing him to the ground and then kicking him about the head and face, and in otherwise admin-

16 *Complaint.*

istering to plaintiff severe punishment, and by reason thereof plaintiff sustained a fracture and other injury of the skull and other serious and permanent injuries to and about his head, face and body, compelling his removal to a hospital, and since said date plaintiff has been and he now continues to be under medical treatment and attention for his said injuries and wholly disabled from working and performing any services, thereby sustaining a large loss in wages.

17 Fourth: Plaintiff has sustained permanent injuries which will permanently cause him pain and disturbance and affect his ability to earn a living, and by reason of the premises plaintiff has sustained damage in the sum of $25,000.

WHEREFORE, plaintiff demands judgment for the sum of $25,000 damages and costs.

MIELE & CASTELLANO,
Attorneys for Plaintiff,
299 Broadway,
Manhattan, New York City.

18 (Verified 2/5/26 by Valentin Encarnacion.)

19

Answer.

SUPREME COURT,

KINGS COUNTY.

[SAME TITLE.]

Defendant, William A. Jamison, answering the complaint of the plaintiff herein:

Denies upon information and belief each and every allegation contained in the paragraphs thereof designated "Second", "Third" and "Fourth". 20

WHEREFORE, defendant demands judgment dismissing the complaint herein, with costs.

JAMES B. HENNEY,
Attorney for Defendant,
William A. Jamison,
100 William Street,
Borough of Manhattan,
City of New York.

(Verified 3/11/26 by William A. Jamison.) 21

22

Bill of Particulars.

SUPREME COURT,

KINGS COUNTY.

[SAME TITLE.]

Plaintiff for his bill of particulars alleges and states:

23 1. The accident occurred on the 19th day of May, 1925, at about 11:30 A. M.

2. Plaintiff was at work and working on barge "No. 3".

3. Barge "No. 3" was then lying in navigable water off the Jay Street Terminal in the Borough of Brooklyn.

4. The foreman or superintendent who committed the assault and battery was a person by the name of Frank, surname unknown to plaintiff. He was foreman of the gang; a man weighing
24 about 140 pounds, of fair complexion, between the age of 25 and 30 years.

5. Plaintiff sustained a fracture and other injuries of base of skull in and about the left frontal region, including intracranial injuries. Because of the said injuries plaintiff has consistent hemorrhages from the nose and ears; because of the aforesaid, plaintiff is subjected to spells of dizziness and loss of hearing. Plaintiff also sustained internal injuries about the face and jaw, causing excessive discomfort.

Bill of Particulars.

6. Plaintiff was confined to the Cumberland Street Hospital, Auburn Place, in the Borough of Brooklyn, for a period of eight (8) days, from May 19th, 1925, to May 27th, 1925.

7. Plaintiff expended One hundred and fifty ($150) Dollars for medical aid and assistance, including medicines and X-ray photos.

8. Plaintiff's usual occupation is that of stevedore; he earns 41c. per hour and works ten (10) hours a day. Plaintiff was unable to attend to his usual vocation for a period of one year, at the rate of Twenty-four and 60/100 ($24.60) Dollars per week.

Dated, New York, March 2nd, 1928.

MIELE & CASTELLANO,
Attorneys for Plaintiff,
Office & P. O. Address,
299 Broadway,
Borough of Manhattan,
New York City.

To:

JAMES B. HENNEY, ESQ.,
Attorney for Defendants,
100 William Street,
Borough of Manhattan,
New York City.

(Verified 3/1/28 by Valentin Encarnacion.)

28

Letter Amending Bill of Particulars.

MIELE & CASTELLANO

COUNSELLORS AT LAW

299 Broadway

New York

Stefano Miele
F. A. Castellano, Jr.

Phone
Worth 3834

March 5th, 1928.

29

James B. Henney, Esq.,
100 William Street,
New York City.

Attention—Mr. Allen M. Taylor.

Dear Mr. Taylor:

Re: Encarnacion *v.* Arbuckle Bros.

Pursuant to our telephone conversation I am sending you a stateemnt of the injuries the plaintiff claims to be permanent; they are as follows:

Fracture of the skull and resultant pressure on the brain.

30

Dizziness, loss of hearing and hemorrhages of the nose.

It is agreed that the motion to preclude returnable March 6th, 1928, in the above case is discontinued.

Hoping this information is sufficient we remain,

Very truly yours,

MIELE & CASTELLANO,
by ALFRED C. DITOLLA.

ACD:CS

31

Extract from Minutes.

At a Trial Term of the Supreme Court of the State of New York, held in and for Kings County, at the Court House in the Borough of Brooklyn, on the 9th day of March, 1928.

Present—Hon. Harry E. Lewis, *Justice.*
Calendar No. 9664—Part 8.

32

[Same Title.]

This cause having been called for trial in its order on the Calendar, and twelve trial Jurors having been duly drawn, empanelled and sworn to try the same, the Jury come into Court and say that they find a verdict for the plaintiff in the sum of Twenty-five hundred ($2500.00) Dollars.

The defendants' counsel moves to set aside the verdict and for a new trial on the ground that the verdict is against the law, the evidence, the weight of the evidence and upon the provisions set forth in Section 549 of the Civil Practice Act. Motion denied. Thirty (30) days' stay of execution after service of notice of entry of judgment to the defendant.

33

A true extract from the minutes.

William E. Kelly,
Clerk.

Frank M. Rooney,
Special Deputy Clerk, Part 8.

34

Judgment.

SUPREME COURT,

KINGS COUNTY.

[SAME TITLE.]

The above entitled action having been duly tried before Mr. Justice Harry E. Lewis and a jury, at Part VIII of the New York Supreme Court, held
35 in and for the County of Kings, at the County Court House therein, on the 9th day of March, 1928, and the jury having duly rendered a verdict in favor of the plaintiff and against the defendant in the sum of Twenty-five hundred ($2500) Dollars and the costs of the plaintiff having been duly taxed in the sum of $138.05 Dollars, it is

Now on motion of Miele & Castellano, attorneys for the plaintiff, it is

ADJUDGED that the plaintiff Valentin Encarnacion, do recover of the defendants William A. Jamison and Christina Arbuckle, doing business
36 under the firm name and style of Arbuckle Brothers, the sum of Twenty-five hundred ($2500) Dollars, together with the sum of $138.05 Dollars costs, as taxed, making in all the sum of $2638.05 Dollars, and that the plaintiff have execution therefor.

Dated, New York, March 15, 1928.

WILLIAM E. KELLY,
Clerk.

37

Case.

NEW YORK SUPREME COURT,

KINGS COUNTY.

TRIAL TERM—PART 8.

[SAME TITLE.]

Brooklyn, March 9, 1928.

38

Before—HON. HARRY E. LEWIS, *Justice*, and a Jury.

APPEARANCES:

FRANCIS A. CASTELLANO, ESQ., for the Plaintiff.

CHARLES G. HILL, ESQ., for the Defendant.

(A jury is duly impanelled and sworn.)

(Mr. Castellano made an opening statement to the jury on behalf of the plaintiff.)

(Mr. Hill made an opening statement to the jury on behalf of the defendant.) 39

VALENTIN ENCARNACION, the plaintiff, 92 Washington Street, Brooklyn, called as a witness in his own behalf, being duly sworn, testifies as follows:

Direct examination by Mr. Castellano:

Q. Is that 92 Washington Street, Brooklyn? A. Yes.

40 *Valentin Encarnacion—Plaintiff—Direct.*

Q. You were born in Porto Rico, were you? A. Yes, sir.

Q. How old are you? A. About thirty years.

Q. On the 19th day of May, 1925, for whom did you work? A. Jay Street Terminal.

By the Court:

Q. What was the name of the firm you worked for there? (No answer.)

41 *By Mr. Castellano:*

Q. For whom did you work? Arbuckle Brothers?

The Court: Is that admitted?

Mr. Hill: Yes.

By Mr. Castellano:

Q. And how long had you worked for the same firm of Arbuckle Brothers in May, 1925; how may years? A. Five years.

Q. And on May 19th how much were you making a day or a week? A. $24.60 a week.

42 Q. And what was your duty? What did you do for Arbuckle Brothers? A. Stevedore.

Q. That is you loaded and unloaded barges? A. Loaded everything.

Q. On May 19, 1925, were you working on barge "No. 3"? A. Yes.

Q. And was that barge in the river? A. Yes, sir.

Q. At the foot of Jay Street, Brooklyn? A. Yes.

Q. And when did you start to work on that day? A. Seven o'clock in the morning.

Q. And who was your foreman on that day? A. Frank.

Q. And how long had he been foreman before that day? A. Five or six months.

Q. Did he do any work? A. No, sir.

Q. About how many were in your gang, working like you? A. Twelve or thirteen men.

Q. And who gave orders to the twelve or thirteen men? Who told you where to go to work and what work to do? A. Frank.

Q. And was Frank there as your foreman since seven o'clock in the morning, too? A. Yes; seven o'clock the superintendent, and then it was Frank.

Q. First the superintendent, and then he 44
brought Frank? A. Yes.

Q. How long was Frank working on May 19, 1925? A. Five or six months.

Q. On that day did he start to work with you at seven o'clock in the morning? A. Yes.

Q. About eleven o'clock or half-past eleven in the morning what happened? A. I worked, and he come and hollered to me and called me some name.

Q. What kind of work were you doing? A. Stevedore.

Q. What kind of stevedoring work were you 45
doing? A. Everything.

Q. Were you loading or unloading barges? A. Loading barges.

By the Court:

Q. What did he say? A. He called me and said, "Hurry up, you black bastard son-of-a-bitch."

By Mr. Castellano:

Q. And what did you say to him? A. I said, "Leave me alone today. I am here for four or

five years and I can do the work and I know what work to do."

Q. And what did he say then? A. He give me a punch and I fall down.

Q. Where did he punch you? A. Right in my eyes.

Q. Right over your eyes? A. Yes, sir.

Q. Which eye? A. Right here (indicating) and I fall down to the floor.

Q. Which arm did he punch you with, the left or the right arm? A. With the right arm.

47

By the Court:

Q. Were you paid so much an hour? A. Forty-one cents an hour.

By Mr. Castellano:

Q. When he punched you on the eye what happened to you? A. I fall down.

Q. And did you get up right away? A. I can't till half-past one.

By the Court:

48

Q. What time was it when he hit you? A. Half-past eleven.

By Mr. Castellano:

Q. And when you woke up at half past one or got up at half past one, where did you find yourself, where were you? A. Somebody take me to the doctor and the doctor take me to the hospital.

Q. Where was this first doctor? A. The doctor of the company.

Q. Was he in the employ of the company, at the foot of Jay Street? A. He belong to the company.

Q. Do you know the name of this company's doctor? A. I don't know the name.

Q. Where did you have to go to this doctor? A. To the hospital.

Q. Before you went to the hospital, you said you went to the company doctor. Where is the company doctor? Where was he at the time when you fell down? A. In a new building.

Q. How many blocks is this new building where the doctor of the company was? A. He sent me 50 to the hospital.

Q. How did you go to the hospital from Arbuckle Brothers' place of business? How did you go there? In an automobile, or did you walk? A. In an automobile, in a taxi.

Q. Who called the automobile for you? A. The bookkeeper.

Q. The bookkeeper of Arbuckle Brothers? A. Yes.

Q. And when you went to the hospital, do you remember the name of the hospital, the Cumberland Street Hospital? A. I don't know. 51

Q. How long did you stay in the hospital? A. Eight days.

Q. And during the eight days that you were in the hospital, did the hospital take pictures of your head, X-rays? A. I can't tell you. I felt crazy.

Q. You don't know what happened in the hospital? A. No.

Q. But you stayed there eight days? A. Yes.

Q. Did you have any bleeding from your ears or from any place, or your nose? A. Nose and mouth and everything, the right ear.

52 *Valentin Encarnacion—Plaintiff—Direct.*

Q. How long did you bleed from the nose and mouth and right ear? A. For six months.

Q. For six months you bled. From what part of your body, where did the blood come from? A. From my nose and my right ear.

Q. How often? Did the blood come out of your nose and right ear for six months every day or every week? A. Every day.

Q. What else did you feel in your head after the accident, or after this day when you were struck in the face? A. Before?

53 Q. After Frank hit you in the face, what did you feel in your head? A. I feel nothing in my head.

Q. Did you feel any pain? A. Before, nothing.

Q. I mean after. A. After I got a pain in my head, pain here (indicating), in the forehead, and I can't open my mouth good.

Q. How many times did Frank punch you? A. I don't know. I was on the floor and I don't know no more.

Q. You did not know after you fell down what happened to you? A. No, I didn't know.

54 Q. Do you have any bother from your ears or your head now, today? Do you have any trouble with your head or ears now? A. Yes.

Q. What trouble do you have? A. The doctor said I have a fracture in my head.

The Court: Strike it out.

By the Court:

Q. How do you feel? A. I feel sick, something in my head (indicating).

Q. You have pains up in the forehead? A. Yes.

Q. Do you have pains on the side? A. Yes.

55

Q. How about the ears? A. I can't hear good.

By Mr. Castellano:

Q. How about your hearing, can you hear better with your left ear than the right? A. Yes.

Q. You can hear from the left ear but not from the right ear? A. (No answer.)

Q. Close up your left ear.

The Court: No, we will not have any such test.

56

By Mr. Castellano:

Q. Before May 19, 1925, could you hear all right? A. Yes.

Q. Were you ever sick before May 19, 1925? A. No, sir.

Q. Did you work every day for four and a half to five years for Arbuckle Brothers? A. Yes.

Q. Every day? A. Every day.

Q. Never sick? A. No.

Q. Since May 19, 1925, have you done any work? A. No, sir.

57

By the Court:

Q. No work at all? A. No.

Q. Did you work any place? A. No.

By Mr. Castellano:

Q. Did you do any work after? A. No.

By the Court:

Q. Didn't you work last year? A. No.

58 Q. Didn't you work last week? A. No.
Q. Two months ago? A. No.
Q. A year ago? A. I don't work.
Q. How long is it since you have been out of work? A. One and a half years.
Q. Didn't you work after May, 1925? A. No.
Q. Not a day? A. No.
Q. Whom do you live with? A. (No answer.)

By Mr. Castellano:

59 Q. Where do you live? A. Washington street.
Q. With whom? With your sister, brother or whom? A. With my brother.
Q. And does he support you? A. Yes.

By the Court:

Q. Does he give you money? A. Yes.

By Mr. Castellano:

Q. You are sure you did not do any work since Frank hit you? A. Yes.
Q. You never went back to work any more? A.
60 No.
Q. Did you try to go back to work for somebody? A. Yes, and I am sick.
Q. What do you mean, you are sick? A. I got something wrong with my nose.
Q. The blood comes from your nose? A. Yes.
Q. Does it still come out of your nose every day? A. Yes.
Q. And when was the last time any blood came from your ear? A. About six months ago.
Q. You have been under the treatment of a doc-

tor after you were discharged from the hospital? A. Yes.

Q. And what is the name of the doctor? A. Cestaros.

Q. And did Dr. Cestaros make some pictures of your head, some X-rays? A. Yes.

Q. How long did you have Dr. Cestaros taking care of you? A. A long time.

Q. Since you came from the country? A. He sent me to the country two months or three months.

62

Q. For two or three months you went to the hospital? A. Yes.

Q. The clinic?

The Court: You are going to have the doctor here?

Mr. Castellano: We are going to have the doctor here.

Cross examination by Mr. Hill:

Q. I understand you to say you have never done a day's work since the time of this accident; is that correct? A. (No answer.)

63

By the Court:

Q. No work since the accident? A. No, sir.

By Mr. Hill:

Q. Are you single or married? A. Married.

Q. Have you got any children? A. In my own country, yes.

Q. You mean down in Porto Rico? A. Yes.

64 *Valentin Encarnacion—Plaintiff—Cross.*

Q. And how many are there? A. Two.

Q. How old are they? A. (No answer.)

By the Court:

Q. Don't you know how old your children are? Are they big or small? A. Small.

Q. Two years, five years, seven years? A. About five years.

Q. They are not both five years, are they? A. No.

65 Q. Is one older than the other? A. (No answer.)

By Mr. Hill:

Q. Whom are they living with? A. (No answer.)

By the Court:

Q. Is your wife in Porto Rico? A. Yes.

Q. Are your children with her? A. Some family over there.

66 *By Mr. Hill:*

Q. Your wife is living here in Brooklyn with you, is she not? A. No.

Q. Where is she? A. In my country.

Q. You say your brother has been supporting you ever since the time of the accident? A. (No answer.)

The Court: He does not understand you at all.

67

By the Court:

Q. Does your brother give you money to live? A. Yes.

By Mr. Hill:

Q. How much does he give you? How many dollars does he give you a week? A. (No answer.)

By the Court:

68

Q. How much money does he give you every week? A. Sometimes $5 and sometimes $8.

By Mr. Hill:

Q. How much does he make a week? A. $25.

Q. Is he married? A. No.

Q. You and your brother live together alone? A. Yes.

Q. This doctor, Dr. Cesteros, when did you first see Dr. Cesteros? A. I can't tell you, I don't remember; a long time.

69

Q. When did you first see him? How long after you came out of the hospital did you go to see him? A. I can't tell you.

Q. Do you know whether it was one month or six months? A. More than eight months.

Q. When you first saw Dr. Cesteros, was that eight months after the accident? A. Yes.

Mr. Castellano: My doctor promised to be here, but he is not here yet. If your Honor will permit me, I will rest with the

70 *Motion to Dismiss the Complaint.*

exception of the doctor, and I will ask your Honor for permission to call him when he comes in.

The Court: Yes, you may call him at any time.

Mr. Hill: I move to dismiss on the ground that it appears, by the plaintiff's own testimony, that the act committed was that of a fellow-servant acting without the scope of his employment.

The Court: Motion denied.

71 Mr. Hill: Exception.

FRANK CURREN, residing at 229 Concord Street, Brooklyn, called as a witness in behalf of the defendant, being duly sworn, testifies as follows:

Direct examination by Mr. Hill:

Q. You are not now employed by Arbuckle Brothers are you? A. Not now.

Q. What is your work at the present time? A.
72 Chauffeur.

Q. For whom? A. Rossow.

Q. You are not connected with Arbuckle Brothers in any way? A. No.

Q. You were not in the room when the plaintiff was on the stand? A. No, sir.

Q. You are the man that had the trouble with him at the foot of Jay Street in May—May 19, 1925? A. Yes.

Q. What time did you go to work that morning? A. Seven o'clock.

Q. Were you employed by Arbuckle Brothers? A. Yes.

Q. As what? A. Taking charge of a gang.

By the Court:

Q. And the plaintiff was in your gang? A. Yes.

By Mr. Hill:

Q. What was your usual duty? A. Well, I was helping out and taking care of the gang and telling them what to do.

Q. Was that your regular work? A. Yes.

74

By the Court:

Q. You are supposed to keep them busy all the time? A. Yes.

Q. And see that they do not loaf? A. Yes.

By Mr. Hill:

Q. What were you being paid? A. The same thing, 41 cents an hour.

Q. And those were the laborers' wages? A. Yes.

Q. And you sometimes acted as a laborer? A. Yes. 75

Q. And sometimes bossed the gang? A. Yes.

Q. When you first started to work this morning at seven o'clock, did you start in bossing the gang or were you working that morning? A. Started in taking charge of the gang.

Q. Tell us your version of the trouble between you and the plaintiff.

The Court: Tell us all that happened.

The Witness: It was about twenty of

twelve, I was outside where they was loading hand trucks, was not inside of a boat, and Valentine was there talking to some other one of the laborers and I told him there was only a few more hand trucks left and to go ahead, and he started calling me names.

By the Court:

Q. You told him to go ahead with his work, and
77 what did he call you? A. I don't like to——

Q. Go ahead. A. He said, "You dirty cocksucker, get out of the way."

Q. He said it just like that? A. Yes, and I said "I am not going to get out of the way," and I said, "I am going to punch you in the nose," and he made a kick for my testicles, and he kicked me in the leg.

By the Court:

Q. You said that before you punched him? A. Yes, and after that he had a hook in his hand and
78 he wanted to hit me with the hook.

By Mr. Hill:

Q. What kind of a hook was that? A. A longshoreman hook, and I grabbed the hook and he got his finger on my mouth and around the lip, and we struggled for a while, and finally I got away from that grip and he got his fingers and tried to tear my eye out, so after that I hit him and he went down.

Q. How often did you strike him? A. Once.

Cross examination by Mr. Castellano:

Q. What is your first name? A. Frank.

Q. And on this day, the 19th of May, 1925, how long had you been foreman of Arbuckle Brothers? A. I worked off and on for about four years.

Q. But steadily before this happened, how long? A. About seven months.

Q. Your gang consisted of how many men on the day of this trouble? A. About sixteen, twenty sometimes.

Q. And were they mostly Spaniards and Porto 80
Ricans? A. Spaniards and white fellows.

Q. Were the white fellows Porto Ricans? A. Porto Ricans and American people.

Q. How many Americans did you have in that gang? A. It is according.

Q. This particular day. A. Sixteen men, I think.

By the Court:

Q. How many Americans were there in that gang? A. Three or four. The rest is Spanish.

Q. And Porto Ricans? A. And Porto Ricans. 81

By Mr. Castellano:

Q. You knew how these men were paid, didn't you? A. Yes.

Q. So much per hour? A. Yes.

Q. And it was part of your business to get as much labor from them as possible every hour? A. No, sir. They have to keep on moving.

By the Court:

Q. You wanted to see that they moved according to what you thought was the right speed? A. Yes.

82 *Frank Curren—for Defendant—Cross.*

By Mr. Castellano:

Q. When you went over to talk to Encarnacion, when he was talking to some friend, just what did you say to him? A. I said, "Twenty minutes to twelve and we want to get this pile of freight. It was not much, about five or ten minutes' work, and the quicker we get done the quicker we get out and eat." And he tried to chase me away and called me names.

83 *By the Court:*

Q. Did you tell it to him just that way, the way you are telling it now? A. That is the way I talked to him, and he told me, "What are you doing here?" he said, "your place is outside there, you cock-sucker, you white Prick, I will make you suck my prick."

By Mr. Castellano:

Q. And what did you say when he said all that? A. I tried to pick up the freight, do it myself, because it was only five or ten minutes' work, and I
84 could have did it myself instead of him arguing with me.

Q. If it had not been for the fact that he refused to go back to work, you would not have said anything to him over those names? A. No, sir.

Q. Is it not a fact they were loading this barge and not unloading it? A. Loading.

Q. You say they were taking away some trucks? A. Loading from the pier and bringing freight inside of the barge, and he was loading inside of the barge, loading the barge up.

Frank Curren—for Defendant—Cross. 85

Q. Were you ever a pugilist? A. No, sir.

Q. Did you ever fight for a living? A. No, sir.

Q. You know how to box, don't you? A. No, sir.

Q. And take care of yourself? A. Oh, I could handle myself.

Q. What part of Brooklyn do you come from?

The Court: What difference does it make?

By Mr. Castellano:

Q. What other work did you do beside steve- 86
doring and foreman? A. Driving a truck.

Q. Anything else? A. No, sir.

Q. For whom did you drive a truck? A. Rockwood, Roulston, Interstate.

Q. You mean an automobile truck for Roulston? A. Yes.

Q. Were you ever anything else besides a chauffeur and a foreman? A. No, sir.

Q. Is it true that after you hit Encarnacion, he fell to the floor of the barge and did not wake up for two hours? A. No, sir.

87

By the Court:

Q. How long did he lie there? A. About ten minutes.

Q. Then where did you take him to? A. I don't take him. Mr. Jones take him to the doctor. They laid him on the bags and as he come to and raised his eyes, he started to call me names, the same thing all over again and called me all kinds of——

The Court: Never mind. Go ahead.

88 *Frank Curren—for Defendant—Re-direct.*

By Mr. Castellano:

Q. You saw him lie there ten minutes? A. Twenty minutes the most.

Q. And during those twenty minutes, he was having a peaceful sleep, was he not? A. Yes.

Q. When he woke up, he was in the doctor's office of the Arbuckle Company, was he not? A. He woke up on top of the bags inside of the barge.

Q. And he was taken to the doctor of the Arbuckle Company? A. Yes.

89 Q. And the Arbuckle Company doctor suggested that he be removed to a hospital? A. I don't know nothing about that.

Q. Anyway he was taken in an automobile by the Arbuckle people to a hospital? A. I don't know anything about that, either.

Q. You know he stayed eight days in a hospital, don't you? A. No, sir.

Q. You knew he had been working there some four and a half to five years for the Arbuckle people? A. Yes.

Q. Steadily employed by them? A. No, sir.

90

Mr. Castellano: That's all.

Re-direct examination by Mr. Hill:

Q. When you say he was not steadily employed, how was he employed there? A. He was under Mr. Kennedy and he let him go for a while, and when he was short of men, take him back again.

Q. How long had he been working there, about? A. I couldn't say. He was working as long as I could say, seven months right along.

91

LOUIS OSBORNE, residing at 375 64th Street, Brooklyn, called as a witness in behalf of the defendant, being duly sworn, testifies as follows:

Direct examination by Mr. Hill:

Q. What is your business, Mr. Osborne? A. At the present time I am an inspector for the War Department.

Q. You saw the occurrence between Valentin and Curren? A. I was present at the time it happened.

Q. At that time, where were you employed? A. 92
I was a checker for the Southern Pacific Company at that time.

Q. Have you ever been employed by Arbuckle Brothers? A. No.

Q. Have you ever had any connection with them or any of their offices? A. No connection whatsoever.

Q. Where were you at the time of this fracas? A. I was in charge of checking freight, that was loaded on the barge at that time.

Q. And you saw the occurrence from beginning to end? A. I was busy working——

Q. Tell us what you saw about it. A. As I was 93
working there, I seen him come in the boat, they started an argument and I heard there was some names being called.

Q. Did you hear the names that were being called? A. Various names being called.

Q. Who was doing the calling? A. They were both calling one another as far as I could make out.

Q. You don't know which one started it then? A. I did not pay much attention, I was busy. The gang was sixteen men, I had to catch the marks

and numbers on those cases and bundles that come in on the boat. I heard them arguing, there is always argument down there. It is a regular everyday occurrence, and I didn't pay much attention to it, and when it started to wind up in a fight——

Q. Did you see the beginning of the fight? A. When I saw them striking blows, I started to pay a little attention to them.

By the Court:

Q. Just before the first blow was struck, did you see what was done? A. I didn't pay much attention to the argument.

Q. The first thing you know, you saw them fighting? A. When they were fighting.

By Mr. Hill:

Q. What was Valentin doing? A. He was tiering the freight in a boat, piling it up.

By the Court:

Q. Did you see him talking there? A. He didn't do much talking.

By Mr. Hill:

Q. Did he do any? A. He tried his best, but he didn't have much chance.

By the Court:

Q. How many men were there in the gang, about sixteen? A. They were coming in and out

of the boat at the time. They were not there all in the boat at the same time.

Cross examination by Mr. Castellano:

Q. Did you see the knock-out? A. I really don't think it was a knock-out. The two of them were clinched and they fell over one on top of the other, and Valentin was underneath and he hit his head on the floor of the boat, and that's what I really think knocked him out.

(The Court then declared a recess until 98 two o'clock.)

After Recess.

(Trial Continued.)

In Rebuttal.

VALENTIN ENCARCION, recalled, testified as follows:

Direct examination by Mr. Castellano: 99

Q. Do you know what a stevedore hook is? A. I didn't use any.

Q. Do you know what a hook is? A. Yes.

Q. Did you try to use a hook on Frank? A. No, sir.

Q. Did you kick Frank in the shins or the testicles? A. No, sir.

Q. Did you try to kick Frank in the shins or testicles? A. No, sir.

Q. Did you call him a dirty name, cock sucker? A. I don't speak English.

Q. You did not use that language? A. No.

100 *Jose Cesteros—for Plaintiff—Rebuttal—Direct.*

By the Court:

Q. Did you try to hit Frank? A. No, sir.

By Mr. Castellano:

Q. Did you ever have any injury to your head before Frank hit you? A. No, sir.

Q. You never were hurt in the head? A. Never.

Q. You are sure about that? A. Sure.

101 *Cross examination by Mr. Hill:*

Q. I understand you to say you worked on these docks for seven years before the accident as a stevedore? A. This is the first place I worked in this country. I came here in 1920.

Re-direct examination by Mr. Castellano:

Q. And you always worked for Arbuckle Brothers? A. Yes.

Mr. Castellano: That's all.

102

Jose Cesteros, residing at 1945 7th Avenue, Manhattan, called as a witness in behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Castellano:

Q. Doctor, are you duly licensed to practise as a physician in the State of New York? A. Yes.

Q. And how long have you been practising as a physician? A. Four years.

103

Q. Where is your office? A. 1945 7th Avenue, New York City.

Q. And that is near what street? A. 117th Street.

Q. Do you know the plaintiff in this action, Mr. Valentin Encarnacion? A. Yes.

Q. Did you ever treat him? A. Yes.

Q. What is the first time that you treated him, doctor? A. I saw him November 27, 1926.

Q. Did you ever treat him before that day for anything? A. No.

104

Q. Did you know him before that day? A. No.

Q. What did you do for him on November 27, 1926? A. I examined him.

Q. What part of his body? A. I examined his head.

Q. And what did you find? A. I found that he was complaining of pus coming out of the right ear, and pain on the right side of the head.

Q. When you said right ear, you pointed to your left ear. A. The right side of his head; and constant headaches.

Q. Pus coming out of what ear?

105

Mr. Hill: He said he complained of that.

By the Court:

Q. Did you see pus coming out? A. Yes, sir.

By Mr. Castellano:

Q. And what else did you see actually at the time, besides pus coming out of his right ear? A. He complained of pain on the right side of his head, constant headaches, pus coming out of his

106 *Jose Cesteros—for Plaintiff—Rebuttal—Direct.*

ear. That is what he came there for, and on examination he could not open his mouth, just barely partially could open his mouth. I examined his ear and found there was pus coming out of his right ear on palpation, and found that the whole side of the right side of the face, of the mastoid over the ear, was very tender.

Q. And what did you do? A. I advised an X-ray picture because he gave us a history, on questioning he gave a history of having been struck and fallen. From that history I suspected
107 a fracture somewhere and I advised an X-ray picture.

Q. And when did you take the first X-ray set of pictures? A. They were taken November 27th, 1926.

Q. That was the very first day that he came there? A. Yes.

Q. Who took those first pictures? A. Dr. Valenta.

Q. Where is he? A. His office is 515 West End Avenue, New York City.

Q. Did you afterwards take other pictures of
108 him? A. Yes.

Q. When were the other pictures taken? A. March 5, 1928.

By the Court:

Q. Were you there when they were taken? A. Yes.

By Mr. Castellano:

Q. Were they taken in your presence? A. Yes.

Q. Developed in your presence? A. Yes.

Jose Cesteros—for Plaintiff—Rebuttal—Direct. 109

Q. Actually delivered to you on March 5, 1928? A. Yes.

Q. They have been in your possession ever since? A. Yes.

Q. Can you read those pictures to the Court and jury? A. Yes.

Mr. Hill: I object to it as immaterial, incompetent and irrelevant, and not properly connected, and the witness not qualified. He did not take them himself.

The Court: He said they were taken and 110
developed in his presence.

By the Court:

Q. Can you read X-ray plates? A. Yes.

The Court: I will allow it.
Mr. Hill: Exception.

By the Court:

Q. Are those the pictures that were taken in your presence? A. Yes.

111

By Mr. Castellano:

Q. How many are there? A. The first section of the pictures, five pictures; the second, two pictures.

Q. Were they all taken on March 5, 1928? A. This picture (indicating) was taken on the 5th of March, 1928.

By the Court:

Q. All of them? A. All of them.

112 *Jose Cesteros—for Plaintiff—Rebuttal—Direct.*

By Mr. Castellano:

Q. Seven altogether? A. Seven pictures.

Mr. Castellano: I offer them all in evidence.

Mr. Hill: I object to it as immaterial, incompetent and irrelevant and no proper foundation laid.

The Court: Mark them.

Mr. Hill: Exception.

113 (The pictures are received in evidence and marked Plaintiff's Exhibits 1, 2, 3, 4, 5, 6 and 7 respectively.)

By Mr. Castellano:

Q. Will you read one or two of those pictures, or all of them, if you will? Who took them? A. Dr. Suchoff.

Q. How do you spell his name? A. S-u-c-h-o-f-f.

Q. What is his first name? A. L. M., 1767 Madison Avenue.

Q. Tell us what the pictures show. A. The
114 pictures show a linear fracture on the right mastoid. It runs obliquely about the temporal maxillary region upward and backward, and that fracture included the jaw, a cross part of the jaw, began at the junction of the lower joint with the upper, which extended backward over the ear back of the mastoid.

Q. Into the base of the skull? A. Yes. The rest of the pictures were made to prove that in a different position to see the extent of the fracture.

Q. And how long is the line of fracture, doctor, about? A. About three and a half inches.

By the Court:

Q. Is that of the outer table? A. Yes.

Q. The outside of the skull? A. The outside of the skull, not inside.

Q. There are two plates to the skull, aren't there? A. Yes, the inner plate and the outer plate.

Q. And it is around the outside plate? A. It is around the outside plate. The other picture was taken, these two extra pictures, in case that you want to see every line of the scalp, it is taken to show the entire contour of the skull. The fracture sometimes is false if you don't take the plate, and when we found a fracture of the plate, we were forced to take two more pictures so that you could see the outline of the entire skull and you could see how the fracture would follow.

These are stereoscopic pictures.

By Mr. Castellano:

Q. What do those stereoscopic pictures show? A. The same fracture.

Q. They proved the fracture? A. Yes.

Q. After November 27, 1926, for how long a period did you continue to treat Valentin Encarnacion? A. I treated him up to now, because he has visited my office sometimes twice a month, three times a month, for the first four months twice a week, and then I observed him every month for fear that something might develop of pressure on his right side.

Mr. Hill: I move to strike out the latter part of the answer.

The Court: Granted.

118 *Jose Cesteros—for Plaintiff—Rebuttal—Direct.*

By Mr. Castellano:

Q. You have continuously treated him right up to date? A. Yes.

Q. And how long did the discharge of matter from his right ear continue? A. That lasted about six months.

Q. And have you cured that part of it? A. Yes, there is no discharge now.

Q. Is there any discharge from the nose, of blood? A. None now.

119 Mr. Hill: I object to it as leading.

The Court: He says there is none now.

By the Court:

Q. That fracture has all knitted, hasn't it? A. Yes, it has healed.

Q. And when was it healed? A. Six months. We cannot determine when it was healed.

Q. It had been healed up when you saw him? A. It had been healed up when I saw him.

Q. It was healed when the pictures were taken? A. Oh, yes.

120 Q. And all that you saw was the result of the fracture? A. Yes.

Q. The pictures do not show a fracture; they show there had been a fracture? A. Yes.

By Mr. Castellano:

Q. For how long did you treat the discharge from the ear? A. About six months.

Q. And how much of a discharge was there? A. Quite a bit.

Q. Profuse? A. Yes.

121

Q. And what did that discharge consist of? A. Just pus.

Q. Any blood in it? A. No blood.

Q. What is that discharge a symptom of? A. Of infection of the middle ear, or the mastoid.

Q. And that is due to what? A. An infection of the mastoid.

Q. And an infection is due to what? A. Probably an assault or a blow of some kind.

By the Court:

122

Q. It can be due to something else too? A. Yes.

Q. You can have mastoiditis without having an assault, can't you? A. Yes.

Q. So it may have come from that? A. Yes.

Q. You are not sure whether that came from the fracture? A. No.

The Court: Strike out all evidence of pus coming from the ear. Disregard it, gentlemen.

By Mr. Castellano:

123

Q. Assuming that Valentin Encarnacion, a man thirty years of age, had never had any injury to his head, that prior to May 19, 1925, he was a young man in good health; that while at work upon a barge he was hit a blow upon the eyes which knocked him to the barge floor, and which rendered him unconscious for a period of about two hours, and afterwards he is removed from there and is sent to a hospital where he remained eight days for treatment; that afterwards he had treatment as an outside patient for

124 *Jose Cesteros—for Plaintiff—Rebuttal—Direct.*

some months, and then, on November 27, 1926, he comes to your office and is found to be in the condition in which you have testified, can you say, with reasonable certainty, whether the condition which you found on November 27, 1926 is a result of the blow or trauma sustained by him on May 19, 1925?

Mr. Hill: I don't recall any testimony that there was any outside treatment following the hospital treatment.

125 The Court: There was some testimony that he went to a dispensary.

A. Yes.

By the Court:

Q. Do you think the assault would be a competent, producing cause? A. Yes.

Q. When did you first see him? A. November 27, 1926.

Q. And you did not take any pictures until March, 1928? A. The pictures were taken November 27, 1926, when he came there.

126 Q. I thought you said March, 1928. A. That was the second set of pictures.

By Mr. Castellano:

Q. Does the first set of pictures show some fracture? A. The first set of pictures shows some fracture.

Q. Do you say that Encarnacion now is well and able to go back to work? A. Well, he can do some work.

By the Court:

Q. Can he do any work? A. Some type of work he cannot do.

Q. He can do light work? A. He has to do light work.

By Mr. Castellano:

Q. Can he hear from the right ear? A. Not very well.

Q. What loss is there of hearing in the right ear? A. Probably forty per cent. loss. 128

Q. Is the injury to his head, this fracture, a permanent injury? A. Oh, yes.

Q. And is the injury, this loss of hearing, a permanent loss? A. Oh, yes.

Q. Since November, 1926, when you first began treating him, up to now, has he shown marked improvement, great improvement or little improvement? A. Very little improvement.

Q. Is there another doctor in Court who helped you in treating this patient? A. Yes.

Q. What is his name? A. Dr. Leroy Pellou.

Q. Do you treat patients in association with each other sometimes? A. Yes. 129

Q. What is the reasonable charge for the services which you rendered? A. Probably about $350. There are three doctors involved.

Mr. Hill: I object to it inasmuch as the bill of particulars limits it to $150.

Mr. Castellano: He says he spent $150, but he does not say how much he actually incurred. It is the second page of my bill of particulars.

Mr. Hill: It says the plaintiff expended.

130 *Jose Cesteros—for Plaintiff—Rebuttal—Cross.*

By Mr. Castellano:

Q. How much has he paid you on account of your bill? A. $65.

Q. And he owes you the rest? A. He owes me the rest, yes.

Cross examination by Mr. Hill:

Q. Doctor, you just stated that this fracture of the skull was permanent? A. Yes.

131 Q. What do you mean by that? A. The scar will be left for as long as he lives.

Q. But when he came to you, it had entirely healed up to that time? A. Yes, it had entirely healed.

Q. And the only trouble you found with him was this discharge from the ear and some trouble with his mouth? A. Yes, he could not open his mouth.

Q. That trouble with his mouth has cleared up, has it not? A. It is a little better.

Q. It is better? A. Yes.

132 Q. How many actions have you appeared for Mr. Castellano, the attorney in Court? A. Never.

Q. This is the first action that you have appeared for their office? A. Yes.

Re-direct examination by Mr. Castellano:

Q. Did you ever see me before today? A. Never.

The Court: I would like to have the plaintiff come back to the stand.

133

VALENTIN ENCARNACION, recalled, testifies as follows:

By the Court:

Q. Did you ever have any trouble with your ear before the trouble with Frank? A. No, sir.

Q. Were you ever hit on the head after Frank hit you? A. No, sir.

Q. Did you ever have any trouble with your head before the accident? A. No, sir.

Mr. Hill: I move to dismiss the complaint on the ground it appears affirmatively that the act complained of was that of a fellow-servant acting outside the scope of his employment. 134

The Court: Denied.

Mr. Hill: Exception.

Mr. Hill sums up to the jury on behalf of the defendant.

Mr. Castellano sums up to the jury on behalf of the plaintiff.

135

The Court then charged the jury as follows:

Charge of the Court.

LEWIS, *J.*:

Gentlemen of the Jury: You have now rendered service for about a week. Some of you may have had experience in cases before. You realize, of course, that everything that a witness says on the witness stand is not to be credited. You have in-

dicated by your verdicts in many cases your wisdom in separating testimony that you do not believe from testimony that you do believe, and that rule should apply in this case.

This plaintiff claims that he was assaulted by his foreman. The foreman is not being sued. Arbuckle Brothers are being sued, and the claim is that Frank, concededly the foreman in charge of this gang of sixteen laborers of which the plaintiff was one, was engaged in loading a barge. The
137 plaintiff says that while he was so engaged the foreman came along and said to him "Hurry up!" and used some profanity, and then, using some more unseemly language, punched him so violently that he fell to the floor of the barge and hit his head and thereby he sustained the injuries which have been testified to.

The law is that the master is not liable for every assault committed by his servant. The master is liable only when the acts of the employee are within the scope of his employment. It does not make any difference that the acts are done while the work is being prosecuted. That is not
138 the test; the test is whether they are done by the servant in furtherance of the master's business and are such as can fairly be said to have been authorized by the master—and by authorization is not meant expressly conferred—and whether they are such as are incident to the performance of the duties entrusted to the foreman by the master.

By way of illustration, so that you will understand that: If these two men, Frank and this plaintiff, got into a dispute arising out of some personal difference and Frank assaulted the plain-

tiff, there would be no liability. The master is responsible only if the assault was done by his foreman in the furtherance of the master's work. Now, bear that in mind.

If you find that that assault was committed in furtherance of the master's work and also that it was unprovoked, the plaintiff can succeed. When I say unprovoked I mean this: There is some testimony here by the foreman that he said something to the plaintiff with reference to his work, ordering him on the ship or what not, that there was a retort by the plaintiff, and that then 140 the plaintiff used a hook, stuck his finger in the foreman's eye and in his mouth, and used some profanity and resorted to other conduct, and that finally the foreman was compelled to use the force that he did in order to withstand the possibility of an attack upon him. Of course that would be a provoked assault, and I need not say to twelve intelligent men like you that under such circumstances, if you believe Frank, the plaintiff cannot succeed.

So you will analyze the evidence for the purpose of determining first whether the assault was 141 made in the furtherance of the master's duties, as I have defined them to you, and, secondly, whether it was provoked. Both those propositions must be established by the plaintiff by the greater weight of believable proof, and if that burden has been borne then you go to the question of damage.

Again let me emphasize what I have repeatedly said to juries, that you are not concluded by what the plaintiff says as to his injuries unless you believe it, and you are not concluded by what the doctor says as to the extent of the injuries. You

have a right to say that the doctor and the plaintiff have grossly exaggerated the condition; and, of course, the mere fact that a man stays out of work does not necessarily justify the conclusion that his doing so is due to the fact of an injury to his head. As I have said during the week—I think to some of you—some men prefer not to work, and it is the duty of every man who is hurt to do everything that is possible to minimize his damage. The plaintiff could have done some work. That evidence comes from the doctor himself.
143 Was this injury such that the plaintiff should have stayed out of work since May 19, 1925? I say to you that the evidence is to the contrary. How long was he, of necessity, out of work? That is the determining factor. And when I say, how long was he of necessity out of work? I mean this: How long did this injury prevent him from working? And when you have determined the length of time, you multiply it by his average daily or weekly wage. He would be entitled to that amount, and he would be entitled also to something for pain and suffering, and for the reason-
144 able medical bill of his doctor, and if you believe the injuries to be permanent, he would be entitled to something for that.

That is all there is to be said on the question of damage, and the mere fact that I talk about damages is no indication that I desire to convey an opinion to you as to my attitude. I give you the rule of damage so that if you reach that question you will know what to consider.

If this assault was committed in furtherance of the master's employment and was unprovoked, you go to the question of damage. If, on the con-

trary, you believe it was provoked or was not authorized, either expressly or impliedly, or done in the furtherance of the master's employment, then there must be a verdict for the defendant.

Do not be swayed by anything that the lawyers have said about promises or about what they will do after the rendition of a verdict. That does not mean anything. This is your problem, and you must decide this case on the evidence. When once you have decided it, this trial will be over, and promises made will have no effect whatsoever. You decide this case on the evidence, and then with your verdict everybody will be in accord. Do not be prejudiced at all, either one way or another. Leave out sympathy, and render a verdict based upon what you believe to be the fact.

Mr. Castellano: No requests.

Mr. Hill: No requests.

The Court: Retire.

(For verdict of jury and motions see Clerk's minutes.)

148

Stipulation as to Plaintiff's Exhibits 1 to 7, Inclusive, in Argument of Appeal.

IT IS HEREBY STIPULATED, CONSENTED TO AND AGREED, by and between the attorneys for the respective parties hereto, that the printing of Plaintiff's Exhibits 1 to 7, inclusive, be and the same is hereby dispensed with.

Dated, New York, April 25th, 1928.

MIELE & CASTELLANO,
Attorneys for Plaintiff-Respondent.

149

JAMES B. HENNEY,
Attorney for William A. Jamison,
Defendant-Appellant.

150

151

Affidavit of No Opinion.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

CHARLES G. HILL, being duly sworn, deposes and says: That he is an attorney-at-law associated with James B. Henney, the attorney for William A. Jamison, the defendant-appellant; that he tried the within action in behalf of William A. Jamison the defendant, and that no opinion was given by the trial Court.

CHARLES G. HILL. 152

Sworn to before me this }
24th day of April, 1928. }
CHAS. J. O'CONNOR,
Commissioner of Deeds,
City of New York.
Kings Co. Clerk's No. 3.
Term expires March 8, 1929.

153

154

Stipulation Settling Case.

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties hereto, that the foregoing case on appeal contains all the evidence taken upon the trial, and all the exceptions of all the parties, and that an order may be entered herein settling the same as such, and ordering the same on file without further notice.

Dated, New York, April 25th, 1928.

MIELE & CASTELLANO,
155 Attorneys for Plaintiff-Respondent.

JAMES B. HENNEY,
Attorney for William A. Jamison,
Defendant-Appellant.

Order Settling Case.

Upon the foregoing stipulation, the foregoing case on appeal which contains all the evidence and
156 exceptions of all the parties, is hereby settled and ordered on file.

Dated, Brooklyn, N. Y., May 2, 1928.

H. E. LEWIS,
J. S. C.

157

Stipulation Waiving Certification.

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated by and between the attorneys for the respective parties hereto, that the foregoing are true copies of the judgment roll, motion for new trial, notice of appeal, the case and exceptions as settled, and the whole thereof now on file in the office of the Clerk of the County of Kings, and that certification thereof by said Clerk is hereby waived, and that an order directing the filing of the record in the Appellate Division may be entered without further notice. 158

Dated, New York, April 25th, 1928.

MIELE & CASTELLANO,
Attorneys for Plaintiff-Respondent.

JAMES B. HENNEY,
Attorney for William A. Jamison.
Defendant-Appellant.

Order Filing Record in Appellate Division. 159

Pursuant to the foregoing stipulation, it is

ORDERED, that the within printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court in and for the Second Judicial Department.

Dated, Brooklyn, N. Y., May 2, 1928.

H. E. LEWIS,
J. S. C.

ADDITIONAL PAPERS TO COURT OF APPEALS.

163

Notice of Appeal to Court of Appeals.

SUPREME COURT,

KINGS COUNTY.

VALENTIN ENCARNACION,

Plaintiff,

against

WILLIAM A. JAMISON and CHRISTINA ARBUCKLE, doing business under the firm name and style of Arbuckle Brothers, 164

Defendants.

PLEASE TAKE NOTICE that the above named plaintiff hereby appeals to the Court of Appeals from a judgment in the above entitled action in favor of the defendant, William A. Jamison, and against the plaintiff, entered in the office of the Clerk of the County of Kings, on the 16th day of July, 1928, reversing a judgment in said action entered in the Office of the Clerk of the County of Kings 165 on the 15th day of March, 1928, in favor of the plaintiff and against the defendant William A. Jamison, for the sum of Two thousand six hundred thirty-eight and 05/100 ($2,638.05) Dollars, and also from an order, ordering and adjudging that the judgment so appealed from be and the same is unanimously reversed upon the law and facts with costs, and the complaint be dismissed with costs, which order was duly entered in the Office of the Clerk of the Appellate Division of the

166 *Notice of Appeal to Court of Appeals.*

Supreme Court, Second Judicial Department, on the 28th day of June, 1928, and the plaintiff appeals from each and every part of said judgment of reversal, and from the said order entered herein.

Dated, New York, September 4th, 1928.

Yours &c.,

MIELE & CASTELLANO,
Attorneys for Plaintiff-Appellant,
Office and P. O. Address,
167 299 Broadway,
New York City.

To:

JAMES B. HENNEY, Esq.,
Attorney for Defendant
William A. Jamison, Respondent,
100 William St.,
New York City.

CLERK OF THE SUPREME COURT,
Kings County.

168

169

Order of Reversal.

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 28th day of June, 1928.

Present—Hon. Edward Lazansky,
Presiding Justice.
" J. Addison Young,
" Isaac M. Kapper, 170
" Albert H. F. Seeger,
" William B. Carswell,
Justices.

[Same Title.]

The above named William A. Jamison, a defendant in this action, having appealed to the Appellate Division of the Supreme Court from a judgment of the Supreme Court entered in the office of the Clerk of the County of Kings, on the 171
15th day of March, 1928, herein, and the said appeal having been argued by Mr. Theodore H. Lord of Counsel for the appellant, and argued by Mr. James A. Gray of Counsel for the respondent, and due deliberation having been had thereon,

It is Ordered and Adjudged that the judgment so appealed from be and the same is hereby unanimously reversed upon the law and the facts, with costs, and complaint dismissed, with costs.

Enter,

E. L.,
P. J.

172

Judgment of Reversal.

SUPREME COURT,

KINGS COUNTY.

[SAME TITLE.]

The defendant, William A. Jamison, having appealed to the Appellate Division of the Supreme Court, in and for the Second Judicial Department,
173 from the judgment entered herein, in the office of the Clerk of the County of Kings, on the 15th day of March, 1928, in favor of the plaintiff and against the defendant, William A. Jamison, in the sum of Two thousand six hundred thirty-eight and 05/100 ($2,638.05) Dollars, and said Appellate Division having heard said appeal, and by an order entered therein in the office of the Clerk of said Court, on the 28th day of June, 1928, having ordered and adjudged that said judgment, so appealed from, be unanimously reversed upon the law and the facts, with costs of said appeal,
174 and dismissed the complaint with costs to the defendant, William A. Jamison, and the record remitted from said Appellate Division having been filed in the office of the Clerk of the County of Kings, and the costs of the defendant, William A. Jamison, having been adjusted by the Clerk of this Court at the sum of $306.10,

Now, on motion of James B. Henney, the attorney for the defendant, William A. Jamison, it is

Judgment of Reversal. 175

ADJUDGED, that the judgment entered herein, in the office of the Clerk of the County of Kings, on the 15th day of March, 1928, in favor of the plaintiff and against the defendant, William A. Jamison, in the sum of Two thousand six hundred thirty-eight and 05/100 ($2,638.05) Dollars, be and the same is hereby unanimously reversed upon the law and the facts, with costs, and the complaint dismissed, with costs to the defendant, William A. Jamison, and that the defendant, William A. Jamison, do recover of said plaintiff the sum of $306.10, his costs as taxed, and said defendant, William A. Jamison, have execution therefor. 176

Judgment signed and entered this 16th day of July, 1928.

WILLIAM E. KELLY,
Clerk.
(SEAL)

177

173

Opinion of Appellate Division.

SUPREME COURT,

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT.

LAZANSKY, *P.J.*, YOUNG, KAPPER, SEEGER and CARSWELL, *JJ.*

[SAME TITLE.]

179

APPEAL by defendant William A. Jamison from a judgment of the Supreme Court, entered in the office of the Clerk of the County of Kings on March 15, 1928, upon a verdict against him for $2,500 damages.

THEODORE H. LORD (Daniel Miner with him on the brief), for the Appellant.

JAMES A. GRAY, for the Respondent.

KAPPER, *J.*:

The action seeks to hold an employing stevedore for an assault committed by one of his em-
180 ployees, a "Foreman" or "gang-boss", upon a fellow-employee. The assault was inflicted while the plaintiff and the foreman were on a barge in the East River at the foot of Jay Street, Brooklyn, on May 10, 1925. The work in hand appears to have been the loading of the barge. Plaintiff claimed that this "foreman" called him an opprobrious name and told him to "hurry up", and upon the plaintiff retorting that he knew what work to do, the foreman punched him, causing him to fall. He claimed to have been seriously hurt.

The foreman testified that in this loading work he took "charge of a gang", that plaintiff was in his "gang", and that it was his duty "to keep" the men "busy all the time". He also testified that his wages were the same as that of the men in the "gang", and that at times he acted as a laborer and at other times "bossed the gang". The evidence permitted the conclusion that a gang boss or foreman assaulted an employee who was subject to his orders; and the verdict of the jury, under the charge of the learned trial Justice, found the employing stevedore liable for this assault, upon the theory that the same was committed "in the furtherance of the master's work".

In *Gabrielson* v. *Waydell* (135 N. Y. 1), it was held that the owners of a vessel are not liable for an assault by the ship's captain upon a seaman while on the high seas. While in respect of some matters a ship's captain is not a fellow-servant with the seaman under his authority, it is pointed out in the case cited that liability of owners of a vessel to a seaman for the act of the ship's captain is limited to duties resting upon the owners under the principles of the maritime law, which, by force of the situation, could only be discharged through the agency of the vessel's master. At any rate, the case is authority against liability of a ship's owner for an assault committed by the captain upon a seaman. Assuming that to be so, it necessarily follows that one of lesser authority than the captain could not bind his master for the consequences of a wilful wrong inflicted upon another in the same employment. And this view is conceded by the respondent, who seeks to overcome it only by what is urged as a change

184 *Opinion of Appellate Division.*

in the law. It is urged first that stevedores, like seamen, are now entitled to the benefits to be derived from jurisdiction of common law courts in cases involving maritime torts, and this is so (International Stevedoring Co. *v.* Haverty, 272 U. S. 50). It is then claimed that the ruling in Gabrielson *v.* Waydell (supra) has been made obsolete by the Act of Congress (referred to generally as the Jones Act), being Section 20 of the Act of March 4, 1915, as amended by Section 33 of the Act of June 5, 1920. This Act of Congress
185 extended to seamen the common law right or remedy given in cases of personal injury to railway employees (Panama R. R. Co. *v.* Johnson, 264 U. S. 375, 389). And because the Railway Employers' Liability Act declares an employer liable for injury resulting in whole or in part "from the negligence of any of the officers, agents, or employees" of such railroad company (Act of April 22, 1908, being entitled "An Act Relating to the liability of common carriers by railroad to their employees in certain cases") and thereby abolished the common law fellow-servant rule, it is
186 contended that the assault committed by this gang boss must be regarded as the act of a fellow-servant for which the master is liable within the principles now declared in cases of maritime tort. There is no analogy between the real case and the invoked rules. The Railway Employers' Act (supra) is explicit in predicating liability upon "negligence". No term or phrase other than "negligence" as a basis of liability is mentioned in the legislation. Certainly "assault" is nowhere mentioned or referred to. The entire theory of the Act is that of negligence as the term has been understood from time immemorial, empha-

sized by provisions for a diminution of damages recovered when there is found to be "negligence attributable to such employee", or he has "been guilty of contributory negligence". It is these provisions only which were extended to the "Jones Act" (supra), with the result, in my opinion, that the case of Gabrielson *v.* Waydell (supra), is still alive in so far as concerns a recovery of full indemnity for injury, as at common law.

The case involves nothing more than that of an assault by one employee upon another, and for 188 such an act a master is not responsible even though the assault be committed by one who thought a fellow-servant, subject to his orders, should have hurried his work a little more or done something in a different way. The master, neither expressly nor impliedly, employed the gang boss to commit an assault upon another employee.

In my opinion the action is not maintainable, and I therefore advise that the judgment be reversed upon the law and the facts, with costs, and that the complaint be dismissed, with costs.

189

190

Stipulation Waiving Certification of Record to Court of Appeals.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the foregoing are true and correct copies of the Record on Appeal to and the opinion of the Appellate Division, on file with the Clerk of the Appellate Division, Second Department; the Notice of Appeal to the Court of Appeals; the Order of Reversal; the Judgment of Reversal; all of which are now on file with the Clerk of the
191 County of Kings. Certification thereof hereby is waived.

Dated, New York, October 4, 1928.

MIELE & CASTELLANO,
Attorneys for the Plaintiff-Appellant.

JAMES B. HENNEY,
Attorney for the Defendant-Respondent.

192

Order of Substitution of Parties Defendant. 193

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the eleventh day of July, A. D. 1929.

Present, Hon. Benjamin H. Cardozo,
Chief Judge, Presiding.

194

Valentin Encarnacion,
Appellant,

vs.

William A. Jamison and Christina Arbuckle, doing business, &c.,
Defendants,

William A. Jamison,
Respondent.

195

A Motion for re-argument of the motion heretofore denied on the 11th day of June, 1929, that Inez M. Jamison, William N. Dykman and Martin E. Goetzinger, executrix and executors of the last Will and Testament of William A. Jamison, deceased, be substituted as parties defendant-respondent in this action in place and stead of William A. Jamison, deceased, for the continuance of said action against them, for the amendment of all papers and proceedings accordingly and the reinstatement and re-argument of the appeal hav-

196 *Order of Substitution of Parties Defendant.*

ing been heretofore made upon the part of the appellant herein, and papers having duly submitted thereon, and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is granted.

WM. J. ARMSTRONG,
Clerk.

(SEAL)

(A copy)

197

198

Order of Reversal and Judgment Reinstating Verdict. 199

COURT OF APPEALS.

STATE OF NEW YORK, SS.:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 11th day of July in the year of our Lord one thousand nine hundred and twenty-nine, before the Judges of said Court.

Witness, 200

The HON. BENJAMIN H. CARDOZO,
Chief Judge, presiding.

WM. J. ARMSTRONG, Clerk.
Remittitur *July 12, 1929.*

VALENTIN ENCARNACION,
Appellant,

against

WILLIAM A. JAMISON and CHRISTINA ARBUCKLE, doing business, &c., 201
Defendants,

INEZ M. JAMISON, WILLIAM H. DYKMAN and MARTIN E. GOETZINGER, Executrix and Executors of the last Will and Testament of William A. Jamison,
Defendants.

BE IT REMEMBERED, That on the 4th day of February in the year of our Lord one thousand nine hundred and twenty-nine Valentin Encarnacion the appellant in this cause, came here unto the

202 *Order of Reversal and Judgment Reinstating the Verdict.*

Court of Appeals, by Miele & Castellano, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the Judgment and Order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Inez M. Jamison, William N. Dykman and Martin E. Goetzinger, Executrix and Executors the respondents in said cause, afterwards appeared in said Court of Appeals by James B. Henney, their attorney.

203 Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. James A. Gray, of counsel for the appellant, and by Mr. Theodore H. Lord, of counesl for the respondents, and after due deliberation had thereon, did order and adjudge that the Judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and that of Trial Term affirmed with costs in this court and in Appellate Division.

204 And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court there to be proceeded upon according to law.

THEREFORE, It is considered that the said Judgment of the Appellate Division be reversed and that of Trial Term affirmed with costs in this Court and in Appellate Division, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of

Order of Reversal and Judgment Reinstating the Verdict. 205

New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

WM. J. ARMSTRONG,
Clerk of the Court of Appeals,
State of New York.

COURT OF APPEALS, CLERK'S OFFICE, } 206
ALBANY, July 12th, 1929. }

I HEREBY CERTIFY that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

WM. J. ARMSTRONG,
Clerk.

207

208 **Order of the Supreme Court Directing Judgment in Accordance with Court of Appeals Order and Judgment.**

At a Special Term of the Supreme Court, Part II held in and for the County of Kings, at the County Court House, in the Borough of Brooklyn, City and State of New York, on the 7th day of August, 1929.

Present:

HONORABLE EDWARD J. BYRNE,

Justice.

209

VALENTIN ENCARNACION,

Plaintiff,

against

INEZ M. JAMISON, WILLIAM N. DYKMAN and MARTIN E. GOETZINGER, Executrix and Executors of the last Will and Testament of William A. Jamison, deceased,

Defendants.

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210 An appeal having been heretofore taken by the above named plaintiff to the Court of Appeals from a final judgment in the above entitled action, in favor of William A. Jamison and against plaintiff, entered in the office of the Clerk of the County of Kings on the 16th day of July, 1928, adjudging that the judgment entered herein in the office of the Clerk of the County of Kings on the 15th day of March, 1928 in favor of the plaintiff and against the defendant William A. Jamison in the sum of Two Thousand Six Hundred and Thirty-eight Dollars and Five Cents ($2,638.05) be and the same is hereby unanimously reversed upon the law, with costs, and the complaint dismissed with costs to the defendant William A. Jamison, and that the defendant William A. Jami-

Order of the Supreme Court Directing Judgment in Accordance with Court of Appeals Order and Judgment.

211

son do recover of said plaintiff the sum of Three Hundred and Six Dollars and Ten Cents ($306.10) costs as taxed, and that said defendant William A. Jamison have execution therefor, and the death of the said William A. Jamison having been suggested in the Court of Appeals, and the said Court of Appeals having by order dated the 11th day of July, 1929, substituted Inez M. Jamison, William N. Dykman and Martin E. Goetzinger, Executrix and Executors of the last Will and Testament of 212
William A. Jamison, deceased, as parties defendant-respondent in this action in place and stead of William A. Jamison, deceased, and having directed the continuance of said action against them, and the amendment of all papers and proceedings accordingly, and the said appeal having been heard by the said Court of Appeals and a decision rendered thereon, and an order and judgment entered thereon dated July 11, 1929, reversing said judgment so appealed from, and ordering that the said judgment of the Appellate Division be reversed and that of Trial Term affirmed, with costs in the Court of Appeals and the Appellate Divi- 213
sion, now upon reading and filing the said order and judgment of reversal of the Court of Appeals dated the 11th day of July, 1929, and upon all of the pleadings and proceedings heretofore had herein, and

On motion of Miele and Castellano, attorneys for the plaintiff, it is

Ordered that the said order and judgment of the Court of Appeals entered herein and dated July 11, 1929, be and the same hereby is made the judgment and order of this court.

Enter

E. J. B.,
J. S. C.

214

Judgment of the Supreme Court.

SUPREME COURT,

KINGS COUNTY.

VALENTIN ENCARNACION,

Plaintiff,

against

INEZ M. JAMISON, WILLIAM N. DYKMAN, and MARTIN E. GOETZINGER, Executrix and Executors of the Last Will and Testament of William
215 A. Jamison, deceased,

Defendants.

An Appeal having been heretofore taken by the above named plaintiff to the Court of Appeals from a final judgment in the above entitled action, in favor of William A. Jamison and against plaintiff, entered in the office of the Clerk of the County of Kings, on the 16th day of July, 1928, adjudging that the judgment entered herein in the office of the Clerk of the County of Kings on
216 the 15th day of March, 1928, in favor of the plaintiff and against the defendant William A. Jamison in the sum of Two Thousand Six Hundred and Thirty Eight Dollars and Five Cents ($2,638.05) be and the same is hereby unanimously reversed upon the law, with costs, and the complaint dismissed with costs to the defendant William A. Jamison, and that the defendant William A. Jamison do recover of the said plaintiff the sum of Three Hundred and Six Dollars and Ten Cents ($306.10) costs, as taxed, and that said defendant William A. Jamison have execution

therefor, and the death of the said William A. Jamison having been suggested in the Court of Appeals, and the said Court of Appeals having by order dated the 11th day of July, 1929 substituted Inez M. Jamison, William N. Dykman and Martin E. Goetzinger, Executrix and Executors of the Last Will and Testament of William A. Jamison, deceased, as parties defendant respondent in this action in place and stead of William A. Jamison, deceased, and having directed the continuance of said action against them and the amendment of all papers and proceedings accordingly, and the 218
said appeal having been heard by the said Court of Appeals and a decision rendered thereon, and an order and judgment entered thereon, dated July 11th, 1929, reversing said judgment so appealed from, and ordering and adjudging that the said judgment of the Appellate Division be reversed and that of Trial Term affirmed, with costs in the Court of Appeals and the Appellate Division, and by order of this Court, dated August 6, 1929, the judgment and order of the Court of Appeals, dated July 11, 1929, was made the judgment of this court and the plaintiff's costs in the 219
Appellate Division and Court of Appeals having been taxed in the sum of

Now on motion of Miele & Castellano, attorneys for the plaintiff, it is

Adjudged that the judgment entered herein in the office of the Clerk of the County of Kings on the 15th day of March, 1928, in favor of the plaintiff and against the defendant William A. Jamison in the sum of Two Thousand Six Hundred and Thirty Eight Dollar and Five Cents ($2,-

220 *Judgment of the Supreme Court.*

638.05) be and the same hereby is affirmed, as of that date, against Inez M. Jamison, William N. Dykman and Martin E. Goetzinger, as Executrix and Executors of the Last Will and Testament of William A. Jamison, deceased, and it is further

ADJUDGED that the said plaintiff recover of the said Inez M. Jamison, William N. Dykman and Martin E. Goetzinger, Executrix and Executors as aforesaid, the sum of Three Hundred Twenty-three Dollars and Fifty-five Cents ($323.55) costs
221 in the Appellate Division and Court of Appeals. Entered this 8th day of August, 1929.

WILLIAM E. KELLY,
Clerk.

222

226

Opinion.

VALENTIN ENCARNACION,
Appellant,

v.

INEZ M. JAMISON, et al., Executrix, etc., of WILLIAM A. JAMISON, Deceased,
Respondents.

(Decided July 11, 1929.)

227

APPEAL by plaintiff from a judgment of the Appellate Division, second department, reversing on the law a judgment of Trial Term entered upon the verdict of a jury against defendants' testator and dismissing the complaint.

JAMES A. GRAY for appellant.

THEODORE H. LORD for respondent.

POUND, J. Defendants' testator was an employing stevedore. Plaintiff was one of his employees who was assaulted by the foreman or gang boss in charge of a gang engaged in loading a barge
228 in the East river. The evidence justifies the inference that the foreman, in an effort to carry out his orders to keep the men busy and in furtherance of the employer's work, assaulted plaintiff, an employee subject to his orders, to make him hurry up with the work in which he was engaged. No question of negligence is in the case. The trial judge allowed a recovery if the jury found that "the assault was committed in the furtherance of the master's work." (*Mott* v. *Consumers Ice Co.*, 73 N. Y. 543, 547.) The jury so found. The Appellate Division reversed, applying the

fellow-servant rule and holding that there was no liability on the part of the employer even though the foreman inflicted the injuries when he was engaged in hurrying up the work in obedience to the employer's orders.

The cause of action having arisen upon the navigable waters of the United States, is to be disposed of under the principles of maritime law. (*International Stevedoring Co.* v. *Haverty*, 272 U. S. 50; *Northern Coal & Dock Co.* v. *Strand*, 278 U. S. 142; 49 Sup. Ct. Rep. 88; *Resigno* v. *Jarka Co., Inc.*, 248 N. Y. 225.) The foreman, in the 230
management of the work intrusted to him by his employer, is a fellow-servant of the members of the gang under his direction and control in the performance of the work. (*Crispin* v. *Babbitt*, 81 N. Y. 516.) For injuries suffered by the men placed under the authority of such a one as the result of his negligence or misconduct in the furtherance of the employer's business, it has been held that the employer is not liable to indemnify the injured employee. (*Gabrielson* v. *Waydell*, 135 N. Y. 1.) Such was the rule of the common law and of the admiralty law as defined by this 231
court.

The learned counsel for the appellant with admirable candor concedes that no fault can be found with the court below for adhering to the rule as thus stated, but he asks this court to change the law "to establish a better rule of conduct and give place to a higher degree of justice." Long and firmly established doctrines are not so easily disposed of, although the authority of recent cases of first impression has at times been disregarded in order to conform the decisions of the court to the actualities of industrial and business life.

232 *Opinion.*

(*Fitzwater* v. *Warren*, 206 N. Y. 355; *Klein* v. *Maravelas*, 219 N. Y. 383.) The *Gabrielson* case was decided by a divided court with a strong dissent. It has been subjected to much adverse criticism. While it may no longer be regarded as authority for the proposition of general maritime law that the misconduct of the captain of a ship in his care of the seamen under him is a risk assumed by the seamen for the consequences of which the owners are not responsible (*Gabrielson* v. *Waydell*, 67 Fed. Rep. 342; *The Osceola*, 189 U.
233 S. 158, 175), there remains in it a vestigial remnant of the once all-comprehensive fellow-servant rule, which was in its fullest glory in the year 1892, to wit, the rule of non-liability of the employer for assaults committed by a superior employee upon his inferior in the performance of the employer's work. To this extent it may be controlling upon this court if it remains in harmony with recent legislation on the subject.

The admiralty and maritime law is subject to change by Congress. Congress has acted and the Supreme Court of the United States has said
234 broadly (*International Stevedoring Co.* v. *Haverty, supra*) that "the statutes do away with the fellow-servant rule" as applied to longshoremen engaged in stowing freight in the hold of a ship within the admiralty and maritime jurisdiction of the United States. We would be content to give this declaration its full face value were it not for the fact that the case was one of the negligence, rather than the misconduct, of a foreman. It thus becomes necessary to examine the course of legislation on the subject to determine its bearing on our decisions.

235

The fellow-servant rule is generally stated in terms of negligence only, although misconduct of a co-employee is also within its scope. By the Seamen's Act of March 4, 1915 (38 Stat. ch. 153, Sec. 20), it was provided that "in any suit to recover damages for any injury sustained on board vessel or in its service, seamen having command shall not be held to be fellow-servants with those under authority." This language proved to be inadequate to substitute the common-law measure of liability for personal injuries for the maritime rule of limited liability in the case of 236
seamen (*Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372), and was probably appropriate only to the relief of seamen in any event. (*Yaconi* v. *Brady & Gioe, Inc.*, 246 N. Y. 300.) It was, however, a gesture in the direction of wider responsibility on the part of the master for the negligence of his servants. It was succeeded by the Jones Act (Merchant Marine Act of June 5, 1920; 41 Stat. ch. 250, Sec. 33; 3 Mason's U. S. Code, tit. 46, ch. 18, Sec. 688, p. 3273), which extends to seamen who shall suffer personal injury in the course of their employment, the rights and 237
remedies given by Congress to railroad employees (*Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 389; *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 324; *Pacific S. S. Co.* v. *Peterson*, 278 U. S. 130) by providing that they may maintain actions against their employers for damages and that in such actions "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply" to them. The reference is to the Federal Employers' Act of April 22, 1908 (35 Stat. ch. 149, Sec. 1; 3 Mason's U. S. Code, tit.

45, ch. 2, Sec. 51, p. 3064) and its amendments which is thus incorporated into the maritime law of the United States. That act, wherever applicable, read literally, imposes liability on the employer for the acts of a fellow-servant only in cases of personal injury to an employee resulting from negligence. Misconduct is not in terms included. (See, also, N. Y. Employers' Liability Law, ch. 121, L. 1921, which applies the vice-principal rule only to cases of negligence.) Nevertheless, Mr. Justice Holmes, writing for the United
239 States Supreme Court in the *Haverty Case* (supra), reads the act as doing away with the fellow-servant rule as freely as he reads the word "seamen" so as to include "stevedores." This, it would seem, is its popular interpretation. As the word "seamen" in the act includes "stevedores", so the word "negligence" should, "in view of the broad field in which Congress has disapproved and changed the (fellow-servant) rule introduced into the common law within less than a century," include "misconduct." Reading *Gabrielson* v. *Waydell* (supra) in the light of the
240 Merchant Marine Act and its history, we do not hesitate to say that the authority of the case as a rule of maritime law has been largely, if not fully, spent; that we should not waste time in pointing out distinctions between negligence and misconduct in this connection in order to defeat plaintiff's recovery but should hold broadly that Congress, in doing away with the fellow-servant rule in cases of negligence coming within the scope of its legislation, has left neither substance nor reason to our earlier decision and that it is no longer controlling. We cannot, with a fair countenance; say that the master is now liable to his servants

for personal injuries due to a careless foreman but is not liable for personal injuries inflicted on them by a brutal foreman in directing the performance of the work and intended and believed to be for the interest of the master. (*Mott* v. *Consumers Ice Co.*, supra).

This case differs materially from *Davis* v. *Green* (260 U. S. 349). In that case the engineer had received an order from the conductor which it was his duty to obey. Out of personal rancor, he killed the conductor. Neither allegations nor proof present the killing as having been done to further 242 the master's business.

The judgment of the Appellate Division should be reversed and that of the Trial Term affirmed, with costs, in this court and in the Appellate Division.

CARDOZO, CH. J., CRANE, LEHMAN, KELLOGG, O'BRIEN and HUBBS, JJ., concur.

Judgment accordingly.

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SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1929

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.